

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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RHODA KAUFFMAN,

Plaintiff,

v.

JOHN T. MCCANN, et al.,

Defendants.

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Civil Action  
No. 05-3687 (JBS)

**OPINION**

**APPEARANCES:**

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**Simandle, District Judge:**

**I. INTRODUCTION**

This case arises out of an automobile accident between the parties that occurred in New Jersey. Plaintiff Rhoda Kauffman ("Plaintiff"), a Pennsylvania resident, filed this action against Defendant John McCann ("Defendant"), a New Jersey resident, seeking monetary compensation in excess of \$100,000, including damages for such non-economic harm as "pain and suffering." (Compl. at 3.)

Defendant filed a motion for summary judgment, seeking to preclude Plaintiff from recovering non-economic damages because of her alleged failure to meet the requirements of N.J. Stat. Ann. § 39:6A-8(a) ("the Automobile Insurance Cost Reduction Act" or "AICRA"). There was a dispute as to whether this statute applied to Plaintiff, as it was unclear whether her insurance provider was authorized to transact automobile insurance in New Jersey at the time of the crash. See N.J. Stat. Ann. § 17:28-1.4 (deemer statute).

The Court heard oral argument on October 19, 2006 and December 7, 2006 and determined on December 13, 2006 that Plaintiff's automobile insurance provider was authorized to transact business in New Jersey as of the date of the accident. Therefore, the Court held that Plaintiff is subject in this action to the requirements of AICRA, but the Court permitted additional briefing and reserved decision as to whether the statute bars Plaintiff from pursuing non-economic damages in this case.

AICRA's limitation on lawsuit threshold will not restrict a plaintiff's remedies if she "has sustained a bodily injury which results in . . . a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to

function normally with further medical treatment." N.J. Stat. Ann. § 39:6A-8(a); see DiProspero v. Penn, 183 N.J. 477, 481-82 (2005) ("[A]n automobile accident victim who is subject to the threshold and sues for noneconomic damages has to satisfy only one of AICRA's six threshold categories and does not have the additional requirement of proving a serious life impact.") Plaintiff claims she has suffered permanent injuries which have not and will not heal to function normally. In addition to medical records, Plaintiff has presented the Court with a medical certification from her doctor stating as much, as the statute requires. Defendant argues that this certification, in and of itself, cannot create a genuine issue of material fact and that the remaining evidence in this case does not do so either.

## **II. STANDARD**

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party; in other words, "the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" Hunt v. Cromartie, 526 U.S. 541, 552 (1999) (quoting Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 255 (1986)). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250; Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 329-30 (3d Cir. 1995) (citation omitted).

With this standard in mind, the Court turns now to the facts of this case.

### **III. BACKGROUND**

On July 25, 2003, Defendant's vehicle collided with Plaintiff's vehicle at about 7 P.M. in Galloway Township, New Jersey. Plaintiff is a resident of Pennsylvania and Defendant is a resident of New Jersey, as they were at the time of the accident.

Approximately one month after the accident, an X-ray of Plaintiff's cervical and lumbar spine showed multilevel degenerative and disc disease, as well as straightening of the spine partly due to fusion at C5-6 and possibly due to spasm in the cervical spine. The radiologist noted that the fusion was likely congenital. The X-ray also showed that Plaintiff had scoliosis in her lower back and multilevel degenerative disease and a congenital anomaly of L5 in the lumbar spine.

On August 26, 2003, Dr. Carl Goodman examined and diagnosed Plaintiff with cervical, trapezius and lumbar strain/sprain;

resolving hematoma and sprain/strain of her left calf; and cephalgia. A lumbar MRI in October 2003 showed that Plaintiff suffers from multilevel degenerative disease in the lumbar spine. The lumbar MRI revealed a mild bulge at L1-2; concentric bulging at L3-4, L4-5 and L5-S1, associated with facet arthropathy and mild stenosis. (Def. Ex. H.) The radiologist's report on that MRI indicates that any injury is congenital or degenerative (id.) and provides little to no support for Plaintiff's claim that she suffered permanent back injury from the accident.

In addition to the injuries she suffered in 2003, Plaintiff previously injured her neck and back in a 1990 automobile accident when a truck hit the car in which she was a passenger. From the time of that accident until the time of the 2003 accident, Plaintiff's lower back continued to bother her and she continued to perform the exercises prescribed by her physical therapist in 1990.<sup>1</sup>

Plaintiff has submitted a medical certification from her treating physician, Dr. Bruce Barris, which indicates that the subject accident caused her disc bulging, lumbar stenosis, lumbar radiculopathy, cervical strain and sprain, and leg contusions. In Dr. Barris's AICRA certification, he opined that based on

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<sup>1</sup> See Davidson v. Slater, 189 N.J. 166, 170 (2007) ("When a plaintiff does not plead aggravation of pre-existing injuries as the animating theory for the claim, a comparative analysis is not required . . . .")

objective medical evidence, including the MRI, Plaintiff's injuries "have not healed to function normally, will not heal to function normally with further treatment and came as a result of the . . . accident." (Def. Ex. E at 1-2.) Dr. Barris made a similar assessment while treating plaintiff, when he noted that her prognosis was "uncertain". (Def. Ex. G.)

On the other hand, in her deposition testimony, Plaintiff described her current symptoms as occasional aches in her neck and lower back. In January 2004, Dr. Barris noted that throughout the late months of 2003, Plaintiff had full range of motion in her lumbar region and reached a plateau in her physical therapy. (Def. Ex. G.). Nevertheless, Dr. Barris opined that Plaintiff's functioning was impacted by periodic spasms and knotting that produce pain. (Id.) Plaintiff has not sought any treatment since January 2004.

#### **IV. DISCUSSION**

Defendant argues that the Court should bar Plaintiff from pursuing non-economic damages because there is no genuine issue of material fact in regard to Plaintiff's allegation that she "has sustained a bodily injury which results in . . . a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." N.J. Stat. Ann. § 39:6A-8(a) "An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not

heal to function normally with further medical treatment.” Id. Defendant argues that Plaintiff is required to come forward with objective medical evidence in support of her claim that she has a permanent injury that impacts functioning; Defendant argues that the doctor’s certification does not, in and of itself, preclude summary judgment. “As defendant notes, a court is not bound to rely solely on a physician’s certification to vault a plaintiff over the verbal threshold.” Davidson v. Slater, 189 N.J. 166, 189 (2007) (citing Rios v. Szivos, 354 N.J. Super. 578, 584 (App. Div. 2002), which held that trial judge erred by precluding summary judgment solely because physician’s certification claimed permanent injury).

Plaintiff opposes, arguing that the New Jersey Supreme Court’s decision in DiProspero v. Penn, 183 N.J. 477 (2005) put the Appellate Division’s holding in Rios in doubt and that it was an open question whether a doctor’s certification precludes summary judgment. The New Jersey Supreme Court’s subsequent decision in Davidson, which explicitly adopted Rios’s point on this topic, precludes that argument. Thus, the Court may treat the certification like any other evidence on summary judgment. Plaintiff also argues that the evidence as a whole precludes summary judgment because, viewed in the light most favorable to her, there is a genuine issue whether she has suffered the type of injury AICRA requires for non-economic damages. However,

Plaintiff fails to point to objective medical evidence upon which the doctor's certification relies, to meet the statutory threshold requirements.

"Although entitled to the benefit of all justifiable inferences from the evidence, the nonmoving party may not, in the face of a showing of a lack of a genuine issue, withstand summary judgment by resting on mere allegations or denials in the pleadings; rather, that party must set forth 'specific facts showing that there is a genuine issue for trial,' else summary judgment, 'if appropriate,' will be entered." U.S. v. Premises Known as 717 South Woodward Street, Allentown, Pa., 2 F.3d 529, 533 (3d Cir. 1993) (quoting Fed. R. Civ. P. 56(e)) (citations omitted). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Defendant has argued that Plaintiff's MRI shows nothing more than normal degeneration of her spine. Defendant's medical

expert, Dr. Neil Goldstein, who examined Plaintiff in 2005 and reviewed her records, determined that there were no long-term effects from the accident and that Plaintiff's physical state was appropriate for someone of her age. (Def. Ex. K.) He affirmed this opinion in April 2006, after reviewing additional medical records. (Id.) Plaintiff provides no objective medical evidence to rebut these conclusions. Plaintiff has repeatedly relied on her doctor's certification. As explained above, if that certification does not actually rely on objective medical evidence showing permanent loss of functioning, the Court may grant summary judgment for Defendant.

Because it is Plaintiff's burden at trial to show that Defendant caused her permanent injuries within the meaning of AICRA, Plaintiff may not merely rest on her pleadings once Defendant has come forward with evidence tending to show that Plaintiff is not suffering permanent injury. Especially persuasive is Defendant's argument that Plaintiff has not sought treatment in nearly three years. To be sure, not all permanent injury requires ongoing treatment, but if Plaintiff were suffering permanent injury, the Court would expect some medical evidence procured recently that shows this to be so. Plaintiff has produced none. On the contrary, the recent reports from Defendant's expert show that Plaintiff has healed to function normally. No reasonable fact-finder could find that Plaintiff's

injuries have not healed to function normally. In the face of nothing other than Plaintiff's doctor's say-so and a four-year-old MRI that indicates the normal effects of aging, the Court cannot let Plaintiff's non-economic claims go to a jury under New Jersey's AICRA statute.

**V. CONCLUSION**

Therefore, the Court shall grant the motion for summary judgment as to Plaintiff's claims for non-economic damages. An appropriate Order shall be entered.

March 29, 2007  
Date

s/ Jerome B. Simandle  
Jerome B. Simandle  
U.S. District Judge